



UNITED STATES DEPARTMENT OF COMMERCE  
National Telecommunications and  
Information Administration  
Washington, D.C. 20230

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October 20, 1995

Mr. William Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Re: Ex Parte Presentation in GC Docket No. 95-  
Amendment of 47 C.F.R. § 1.1200 et seq.  
Concerning Ex Parte Presentations in  
Commission Proceedings

Dear Mr. Caton:

I am writing to notify the Commission that Barbara Wellbery, Joseph Gattuso, and Lisa Sockett from the National Telecommunications and Information Administration (NTIA) met with William Kennard, David Solomon, Susan Steiman, and David Senzel, of the Federal Communications Commission (Commission), Office of the General Counsel, on Tuesday, October 10, 1995 at 2 p.m. NTIA, which is part of the Department of Commerce, serves as the President's principal adviser on telecommunications and information policy issues and also manages the Federal Government's use of radio spectrum. The purpose of the meeting, which took place in David Solomon's office at the Commission, was to discuss matters relating to the above-referenced proceeding.

As part of the above-referenced proceeding, the Commission is considering amending the exemption in its *ex parte* rules for agencies that "share jurisdiction" with the Commission. That exemption applies to any presentation "to or from an agency or branch of the Federal Government or its staff [that] involves a matter over which that agency or branch and the Commission share jurisdiction."<sup>1</sup> We understand that the Commission is considering adding at the end of the shared jurisdiction exemption the following caveat:

"provided that, any new factual information obtained through such a presentation that is relied on by the Commission in its decision-making process will be disclosed by the Commission no later than at the time of issuance of the Commission's decision."<sup>2</sup>

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<sup>1</sup> 47 CFR § 1.1204(b)(5) (1994).

<sup>2</sup> This language is identical to that adopted as part of the exemption from the *ex parte* rules that the Department of Justice and the Federal Trade Commission have for telecommunications competition matters. See *Ex Parte Rules*, 59 Fed. Reg. 53,759 (1995) (to be codified at 47 CFR § 1.1204(b)(8)).

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The following points were made by NTIA at the meeting:

- In NTIA's case, matters involving shared jurisdiction include, among other things, spectrum management responsibilities due to the large number of spectrum bands shared by Federal and non-Federal users,<sup>3</sup> as well as responsibilities relating to U.S. Government oversight of certain satellite communications matters.<sup>4</sup>
- With the increased demand for spectrum and the restructuring of international satellite organizations, it is essential that NTIA and the Commission be able to coordinate effectively and efficiently on matters of shared jurisdiction.
- The current exemption and disclosure practices have been in effect virtually since NTIA was created and have worked well in facilitating the discussion necessary for NTIA and the Commission to coordinate on shared jurisdiction matters.
- When the Commission adopted a rule codifying the shared jurisdiction exemption that had been operative since at least 1980, it noted that coordination between NTIA and the Commission is essential because the Federal Government shares frequency bands with non-Federal Government users, and uses in non-shared bands can affect use in other bands. This essential coordination between the Commission and NTIA on shared jurisdiction matters is very different from practices the Commission's *ex parte* rules were generally designed to deter -- improper attempts to influence decision-makers.
- Under the current rule, NTIA and the Commission have generally coordinated on the issue of whether and to what extent a particular disclosure is necessary. For example, in some cases where the Commission has relied in a decision on facts that had been learned from NTIA, Commission staff reduced those facts to writing, but only after coordinating with NTIA. In other cases, NTIA submitted a written filing as requested by the Commission, but only after determining the appropriate content and timing of the submission.

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<sup>3</sup> See, e.g., 47 U.S.C. §§ 902(b)(2)(L), 922 (1995).

<sup>4</sup> See, e.g., 47 U.S.C. §§ 721(a), 902(b)(2)(C)(iii) (1995).

Commission staff recognized that, in matters involving shared jurisdiction, the Commission and NTIA must coordinate closely so that decisions and policies are made without jeopardizing, for example, essential Federal spectrum activities relating to public safety and national security or international satellite policy deliberations. Commission staff noted that they were not proposing any changes to the current exemption from the *ex parte* rules for military and foreign affairs matters and for classified security information.<sup>5</sup> Commission staff also pointed out that the disclosure requirement is intended to apply only to "new factual information obtained through" a presentation that the Commission relies on in rendering a particular decision.

Ultimately, Commission staff and NTIA agreed that, if the shared jurisdiction exemption were amended to include a disclosure requirement for essential facts, the rule would codify the current practice of ensuring that there is advance coordination before such disclosure, if any, is made. In addition, Commission staff and NTIA agreed that any such rule would recognize that agencies that share jurisdiction with the Commission retain control over the timing and extent of any such disclosures. Commission staff also confirmed that, even if NTIA agrees to make a disclosure on the record in a matter of shared jurisdiction, this decision would not affect continued *ex parte* communications that may be necessary between NTIA and the Commission on such matters on an on-going basis.<sup>6</sup> Finally, Commission staff agreed that any such rule would exempt from disclosure any pre-decisional documents that are not subject to disclosure under the Freedom of Information Act or that are otherwise privileged or sensitive.<sup>7</sup>

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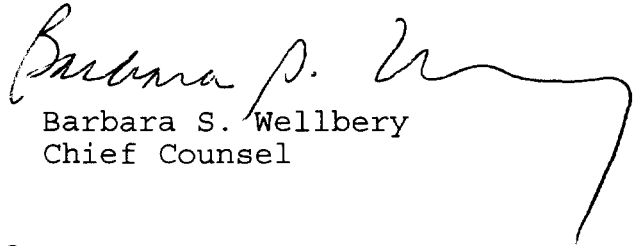
<sup>5</sup> 47 CFR § 1.1204(b)(4) (1994).

<sup>6</sup> During the meeting, NTIA also recommended that the Commission include NTIA in the exemption from the *ex parte* rules that now applies to the Department of Justice (DOJ) and the Federal Trade Commission (FTC) with respect to telecommunications competition matters. See 59 Fed. Reg. 53,759 (1995). NTIA explained that it participates in deliberations on certain competition matters from a telecommunications policy perspective and, therefore, should be operating under the same *ex parte* rule as DOJ and the FTC on those matters. Commission staff responded that it wanted to keep that exemption limited to DOJ and FTC because of their enforcement responsibilities. NTIA continues to believe that it should be included in the telecommunications competition exemption as well.

<sup>7</sup> See, e.g., 5 U.S.C. § 552(b)(5) (1995).

An original and one copy of this letter have been submitted to the Office of the Secretary. Please direct any questions about this presentation to the undersigned.

Sincerely,

A handwritten signature in cursive script, appearing to read "Barbara S. Wellbery", followed by a long horizontal flourish.

Barbara S. Wellbery  
Chief Counsel

cc: The Honorable Reed E. Hundt  
The Honorable James H. Quello  
The Honorable Andrew C. Barrett  
The Honorable Rachelle B. Chong  
The Honorable Susan Ness  
William E. Kennard  
David Solomon  
Susan Steiman  
David Senzel

CERTIFICATE OF SERVICE

I, Cheryl A. Kinsey, do hereby certify that I have this 20th day of October, 1995, mailed by first class United States mail, postage prepaid, copies of the foregoing letter to the parties of record in this proceeding.

Cheryl A. Kinsey  
Cheryl A. Kinsey